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In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1296

WILLIAM A. WAREHIME, d.b.a.
NEZEN MILK FOOD COMPANY, *et al.*,

Petitioners,

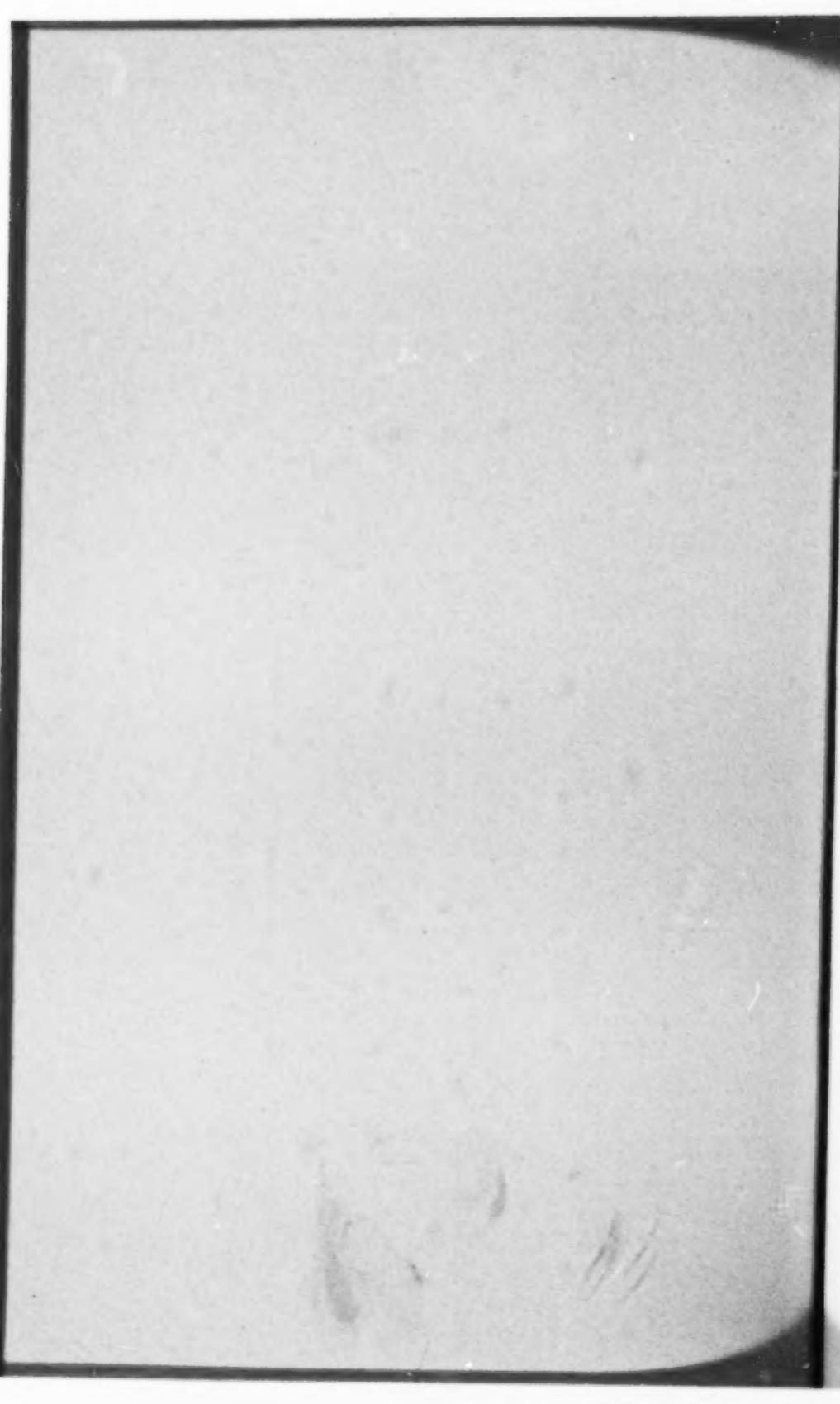
vs.

H. H. VARNEY, MILK MARKET AGENT,
WAR FOOD ADMINISTRATION, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To The United States Circuit Court of Appeals
For the Sixth Circuit
and
BRIEF IN SUPPORT OF PETITION.

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NEZEN MILK FOOD COMPANY, *et al.*,
Petitioners,

vs.

H. H. VARNEY, MILK MARKET AGENT,
WAR FOOD ADMINISTRATION, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To The United States Circuit Court of Appeals
for the Sixth Circuit.

*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

Petitioners, William A. Warehime, d.b.a. Nezen Milk Food Company, *et al.*, respectfully petition this Honorable Court to issue a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above entitled cause on the 8th day of February, 1945.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 118) is officially reported in 147 F. (2d) 238. The orders of that court denying Rehearing (R. 130) and denying Motion to Stay Mandate (R. 131) are not yet officially reported.

The opinion of April 3, 1944 of the District Court of the United States for the Northern District of Ohio, East-

ern Division is officially reported in 54 F. Supp. 907 (R. 105).

The Findings of Fact and Conclusions of Law of the District Court (R. 105) are not officially reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on the 8th day of February, 1945 (R. 117). Petition for Rehearing was filed on the 26th day of February, 1945 and was denied on the 19th day of March, 1945 (R. 130).

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended.

The Supreme Court of the United States, on April 24, 1945, entered an Order staying the mandate of the United States Circuit Court of Appeals for the Sixth Circuit to and including May 21, 1945, providing a petition for writ of certiorari is filed on or before that date, and provided further that a good and sufficient surety bond in the amount of Five Hundred Dollars (\$500.00) is posted on or before that date and that this stay shall continue pending final disposition of the case should the petition for certiorari be filed on or before that date.

QUESTIONS PRESENTED.

- I. Whether the Second War Powers Act delegates to the War Food Administrator authority to require of petitioner handlers of milk the payment of an assessment fixed by the Director of Food Distribution "to meet the expenses which the Director finds will be necessarily incurred by the operations of this (FDO 79) order."
- II. Whether the power to exact the assessment provided for in FDO 79, if implied in the Second War Powers Act, would result in an invalid and unconstitutional delegation of legislative authority.

STATUTES AND REGULATIONS INVOLVED.

The statute involved in this proceeding is Title III of the Second War Powers Act, 1942 (March 27, 1942, Public Law 507, ch. 199, 77th Congress, 2d session, 56 Stat. 177 (50 U. S. C. Sec. 633) which amended subsection (a) of section 2 of the Act of June 28, 1940 (54 Stat. 676) as previously amended by the Act of May 31, 1941 (55 Stat. 236)). The applicable provisions of the Act are as follows:

***** Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

The Act specifies that the President may exercise the powers conferred through such department, agency or officer as he may direct, provides that "any person who wilfully fails to perform any act required by any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor" punishable by fine of not more than \$10,000 or imprisonment of not more than 1 year, or both, and vests the district court with jurisdiction of violations, and of civil action to enjoin violations of the act or any rule, regulation, or order thereunder.

By a series of Executive Orders the President on April 19, 1943 authorized the War Food Administrator to exercise the power under this act, insofar as it relates to priorities and allocations of food. The same orders authorized delegation of any part of the power to employees of the Department of Agriculture in his discretion.

In exercise of the power thus vested in him Marvin Jones, as War Food Administrator, issued Food Distri-

bution Order 79 (8 FR 12426) (R. 7-10) on September 7, 1943. FDO 79 established a system of regulation for handlers of milk. It authorized the Director of Food Distribution to designate milk sales areas, and within such areas to establish quotas for the sale by handlers of milk, cream and milk by-products, base periods for the establishment of quotas, and quota periods. It further authorized the Director to designate market agents for sales areas. The order provides:

“The market agent is authorized and directed to:

- (i) Obtain and assemble reports from handlers; assemble data with respect to the production, shipments, sales and delivery of milk, milk byproducts, and cream in the area and with respect to the handlers under his jurisdiction; and furnish to the Director such available information as may be requested;
- (ii) Receive petitions for relief from hardship; compile all necessary facts and data concerning such petitions; and transmit such petitions to the Director together with his recommendations;
- (iii) With the advice of the advisory committee, prepare schedules establishing for various purchasers or classes of purchasers priorities to the purchase of milk, milk byproducts, and cream from handlers and transmit such schedules for approval to the Director, and such approved schedules shall be made available to handlers as schedules to be followed by them in the disposition of milk, milk byproducts, and cream;
- (iv) Upon the request and with the advice of the advisory committee, devise plans which will permit handlers to share equitably in available supplies of milk and administer such plans upon approval by the Director;
- (v) Keep books and records which will clearly reflect all of his acts and transactions, such books and records to be subject at any time to examination by the Director;
- (vi) Collect the assessments as provided in this order from handlers required to pay such assessments;

- (vii) Deliver to the Director promptly after the designation a bond in an amount and with surety thereon satisfactory to the Director, conditioned upon the faithful performance of the market agent's duties under this order;
- (viii) Employ and fix the compensation of such persons as may be necessary to enable him to perform his duties hereunder;
- (ix) Obtain a bond with reasonable surety thereon covering each employee of his office who handles funds under this order;
- (x) Investigate and report to the Director any violation of this order;
- (xi) Submit to the Director for approval a budget of expenses hereunder of the market agent;
- (xii) Pay out of the funds collected by him as market agent the cost of his bond and of the bonds of his employees, his own compensation and that of his employees, and all other expenses necessarily incurred by him in the performance of his duties hereunder;
- (xiii) Audit or inspect the books, records and other writings, premises, or inventories of milk, by-products, and cream of any handler operating within the milk sales area subject to the jurisdiction of the market agent; and
- (xiv) Perform such other duties as the Director may from time to time specify."

The order further provides in Section (e) (4):

"Each handler shall pay the market agent, within 20 days after the close of each calendar month, after the date of appointment of the market agent, an assessment upon the milk, milk byproducts, and cream, or any such portion thereof as may be specified by the Director, delivered by such handler during each such calendar month. This assessment shall be fixed, and may be modified from time to time, by the Director to meet the expenses which the Director finds will be necessarily incurred by the operations of this order in connection with an order issued pursuant hereto by

the Director: Provided, however, that the assessment shall not exceed \$0.03 per hundredweight of milk, milk equivalent of cream, and skim milk equivalent of milk byproducts."

The order contains the following provision as to sanctions for violations:

"Violations. The War Food Administrator may suspend, revoke, or reduce the quota of any person who violates any provision of this order, may prohibit by order such person from receiving or using milk, cream, or any other material subject to priority or allocation control by the War Food Administrator, and may recommend that any such person be prohibited from receiving, making any deliveries of, or using materials subject to the priority or allocation control of other governmental agencies. In addition, any person who wilfully violates any provision of this order is guilty of a crime and may be prosecuted under any and all applicable laws. Further, civil action may be instituted to enforce any liability or duty created by, or to enjoin any violation of, any provision of this order."

Food Distribution Order No. 79-3 (8 FR 13367) was issued by the Director of Food Distribution effective October 4, 1943, and established what is known as the Cleveland, Ohio milk sales area. For that area it sets quotas for the amount of milk, cream, and milk by-products which handlers are permitted to sell to the civilian market. Milk, cream, and milk by-products delivered to the armed forces and certain other specified agencies are free from quota restrictions. An assessment of one cent a hundredweight on quota milk only delivered by handlers is provided for, to be paid to the market agent and to be used to pay the expenses of administration under the order. The market agent is required to report violations of the order to the Director of Food Distribution.

SUMMARY STATEMENT OF MATTER INVOLVED.

Under Title III of the War Powers Act, 1942, 56 Stat. 178, Title 50 U. S. C., Sec. 633, whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material for defense or of any facilities for defense or for private account or for export, he is authorized to allocate such material or facilities in such manner and upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense and the President is empowered to effectuate the policies of the act through such department, agency or officer of the government as he might direct and in accordance with rules and regulations he might prescribe. The act carries a penalty for its violation or the violation of any regulation or order thereunder of a fine of not more than \$10,000.00 or imprisonment for not more than one year or both.

On December 5, 1942, the President issued Executive Order 9280 (7 F. R. 10179), in which he, in substance, stated that, acting under the Constitution and Statutes of the United States and as Commander-in-Chief of the Army and Navy and in order to assure an adequate supply and an efficient distribution of food to meet war and essential civilian needs, the Secretary of Agriculture was authorized and directed to assume full responsibility for and control over the nation's food program.

In order to carry out this order, the Secretary was delegated the powers of the President as Commander-in-Chief of the Army and Navy and the powers conferred upon the President by Title III of the Second War Powers Act insofar as such powers related to priorities and allocation of food for human or animal consumption or for use in connection with the food program. By Executive Order No. 9322, March 26, 1943 (8 F. R. 3807), as amended by Executive Order No. 9334, April 19, 1943 (8 F. R. 5423), the

powers of the Secretary of Agriculture as delegated in Executive Order 9280 (7 F. R. 10179), issued December 4, 1942, were re-delegated to the War Food Administrator which office was established by the Executive Order, and in this order, the War Food Administrator was authorized to exercise all the powers of the President insofar as such powers related to production, priorities and allocation of food. The Food Administrator was also authorized in his discretion to redelegate any part of the powers conferred on him to any employee or officer of the Department of Agriculture.

The War Food Administrator, on September 7, 1943, issued Food Distribution Order 79 (8 F. R. 12426), establishing a system of regulation for handlers of milk and creating the office of Director of Food Distribution, naming himself such Director. The latter officer was empowered to designate milk sales areas and to establish in such areas quotas of milk for sale by handlers of milk, cream and milk byproducts and the Director was also authorized to establish quota and base periods. The manner in which these things were to be done was specifically provided in the order. The Director was also authorized to appoint Market Agents for each sales area. Each Market Agent was authorized and directed to obtain and assemble specified reports which were required to be made under the terms of the order by each milk handler in the area and also to receive petitions for relief from hardship, and with the advice of an advisory committee, which was created under the order, the market agent was authorized to prepare schedules establishing for various purchasers or classes of purchasers, priorities for the purchase of milk, milk byproducts and cream from handlers and after the Director had approved the schedules they were to be made available to handlers and to be followed by them in the disposition of the products covered in the order. Upon the request and with the advice of the Advisory Committee, the market

agent was to promulgate regulations upon the approval of the Director, providing for the handlers to share equitably in the available supplies of milk and its by-products in the given area. The order specifically provided that:

(4) Each handler shall pay the market agent, within 20 days after the close of each calendar month, after the date of appointment of the market agent, an assessment upon the milk, milk by-products, and cream, or any such portion thereof as may be specified by the Director, delivered by such handler during each such calendar month. This assessment shall be fixed, and may be modified from time to time, by the Director to meet the expenses which the Director finds will be necessarily incurred by the operations of this order in connection with an order issued pursuant hereto by the Director: Provided, however, that the assessment shall not exceed \$0.03 per hundredweight of milk, milk equivalent of cream and skim milk equivalent of milk byproducts.

The market agent was authorized to employ and fix the compensation of such persons as were necessary to perform the duties outlined in the order and was authorized to collect the assessments provided in the order and out of the fund so collected, his salary and expenses and those of his assistants were to be paid.

The order provided that the Director should be entitled to make such audits or inspections of the books and records as in his discretion he deemed essential to the enforcement or administration of the provisions of the order and he was also authorized to obtain such information from and require such reports and the keeping of such records by any person as he might deem necessary or appropriate to the enforcement or administration of the order, all of these things to be done, subject to the approval of the Bureau of the Budget pursuant to the Federal Reports Act of 1942. For a violation of any part or provision of the order, the War Food Administrator was authorized to:

*** * * suspend, revoke or reduce the quota of any person who violates any provision of this order, may prohibit by order such person from receiving, or using milk, cream, or any other material subject to priority or allocation control by the War Food Administrator, may recommend that any such person be prohibited from receiving, making any deliveries of, or using materials subject to the priority or allocation control of other governmental agencies. In addition, any person who wilfully violates any provision of this order is guilty of a crime and may be prosecuted under any and all applicable laws. Further, civil action may be instituted to enforce liability or duty created by or to enjoin any violation of, any provision of this order."

The administration of the order and the powers vested in the War Food Administrator insofar as such powers related to the administration of the order were delegated to the Director who in turn was authorized to re-delegate any of his power to any employee of the United States Department of Agriculture. The provisions of the order applied throughout the United States and the District of Columbia.

Food Distribution Order No. 79-3 (8 F. R. 13367) was issued by the Director of Food Distribution effective October 4, 1943. This order put into effect Order 79 establishing the Cleveland, Ohio Milk Sales Area. The order provided for an assessment of one cent a hundredweight on quota milk delivered by handlers, the sum thus collected to be used to pay the expenses of administration of the order. The market agent was required to report all violations to the Director of Food Distribution, War Food Administration, Washington, D. C.

Suit was brought by petitioners in the District Court on January 10, 1944 to enjoin the enforcement of the assessment provisions of FDO 79 after a deadline of January 5, 1944 had been set by the market agent for payment of the assessments. Each of the petitioners is or was at the

time suit was brought in the District Court, engaged in the business of distributing milk and milk byproducts, wholesale and retail, in the Cleveland, Ohio area and their businesses are, or were, within the ambit of Food Distribution Orders Nos. 79 and 79-3, insofar as such orders may be valid. Defendants to the action in the trial court were H. H. Varney, Milk Marketing Agent, War Food Administration, Cleveland Sales Area, Fred W. Issler, Market Agent, War Food Administration, State of Ohio Sales Area, and Marvin Jones, War Food Administrator, Washington, D. C.

Respondents are threatening to institute criminal proceedings against each of the petitioners because of their failure to make reports and pay the assessments provided in the orders, and respondents are threatening to confiscate the business of each of the petitioners by preventing each of them from obtaining tires, gasoline and priorities necessary to the operation of their respective businesses and each of the petitioners is without adequate legal remedy at law and each of them will suffer irreparable loss and injury unless respondents are enjoined from proceeding against each of them.

Petitioners contend that the assessment provision of War Food Administration Order No. 79 is invalid because it provides for an assessment collectible from milk handlers, the proceeds of which are to be used for the payment of salaries and expenses of the officers and agents of the United States engaged in the enforcement of the order and that there is no statutory authority for the promulgation of regulations by the War Food Administration imposing the cost of the administration of the order on handlers of milk.

Respondents specially appeared in the District Court and moved that service of summons be quashed and that the complaint and motion for preliminary injunction be dis-

missed on account of improper joinder of parties defendant, improper venue and lack of jurisdiction.

Respondents, H. H. Varney, Milk Marketing Agent, War Food Administration, Cleveland Sales Area, and Fred W. Issler, Market Agent, War Food Administration, State of Ohio Sales Area, claimed that each of them was improperly made a party defendant. Defendant, Marvin Jones, War Food Administrator, Washington, D. C., claimed he was improperly served and that the court had acquired no jurisdiction over his person because of service of process on him in Washington, D. C., and further that he was an inhabitant of the District of Columbia and that the court had no jurisdiction of the cause as against him. The trial court sustained the motion of Jones to quash and dismissed the proceedings as to him and overruled the motions of Varney and Issler. After joinder of issue, the court heard proof and on final submission, after findings of fact and conclusions of law, decreed that respondents herein, their agents and anyone acting on their behalf, be enjoined permanently from enforcing the assessment provisions of food distribution orders Nos. 79 and 79-3 against the petitioners or any one of them and from collecting such assessments.

On July 13, 1944 respondents herein filed their notice of appeal to the Circuit Court of Appeals for the Sixth Circuit. The Circuit Court of Appeals, on February 8, 1945, reversed the judgment of the District Court and remanded with directions to dismiss the petition. (R. 117) The Circuit Court found specifically that it had jurisdiction of the cause, that the War Food Administrator is not an indispensable party and that there was a showing by petitioners of such immediate threat of irreparable injury to them as to require that court to afford protection through equitable intervention. The Circuit Court found further that the assessment in question is not a tax and therefore not an unconstitutional delegation of legislative authority

to an administrative agency. On February 26, 1945, petitioners in the Circuit Court of Appeals filed a Petition for a Rehearing. This petition was denied by the Circuit Court on March 19, 1945. (R. 130) Petitioners then made a motion in the Circuit Court for a stay of its mandate pending application to the Supreme Court of the United States for a writ of certiorari. This motion was denied by the Circuit Court on April 3, 1945. (R. 131.)

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals Erred:

1. In holding that the Second War Powers Act delegates to the War Food Administrator authority to promulgate regulations (FDO 79 and 79-3) requiring petitioner handlers of milk, cream and milk byproducts to pay an assessment fixed by the Director of Food Distribution to meet the expenses which the Director finds will be necessarily incurred by the operations of this (FDO 79) order.
2. In holding that the promulgation of Food Distribution Order 79 insofar as the assessment features are concerned in levying an assessment on the handlers of milk is not the exercise of legislative discretion vested by the Constitution in the Congress.
3. In holding that the assessment provisions of FDO 79 and 79-3 were an incident proper to the regulation of the milk industry in time of war.
4. In holding that the assessment levied by FDO 79 on handlers of milk, cream and milk by-products is neither the levying of a tax nor a revenue measure.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. Because the Circuit Court of Appeals for the Sixth Circuit has decided an important question of federal law which has not been but should be settled by this Court.

The question in issue involves the construction of the Second War Powers Act and the constitutional power of Congress to delegate its legislative functions.

2. Because there is involved in this case a grave and important question in which there is a very great public interest in obtaining a decision from the Supreme Court of the United States. The question raised by this case is of a very grave character since it presents a problem fundamental in administrative law, that of the power of administrative agencies to finance their own operations. In view of the trend in recent years toward an ever enlarging field of activity of administrative agencies, the actions of some administrative agency or other now affect almost every individual in the United States. Therefore, there is an extremely keen public concern with respect to the extent of the powers of these agencies. Whether the assessment powers claimed by respondents herein are to be implied, or, can in fact even be expressly delegated by Congress to an administrative agency, is of vital importance to all of us and it is clear that there is a great public interest in obtaining a decision on the matter from this Court of last resort.

3. Because petitioners, as correctly found by both courts below, are threatened with immediate, serious and irreparable injury for which they have no adequate remedy except as sought in this case. The sole issue is the constitutionality of the assessment provision contested. Only this Court can determine such issue.

CONCLUSION.

Wherefore, petitioners respectfully pray that the writ of certiorari be issued by this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and proceeding in the case entitled on

its docket, "H. H. Varney, Milk Market Agent, War Food Administration, et al., Appellants, vs. William A. Warehime, d.b.a. Nezen Milk Food Company et al., Appellees," and that this Court review and decide the said questions presented and reverse the judgment of the Circuit Court of Appeals for the Sixth Circuit entered in said cause, and that petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, at Cleveland, Ohio, May 11, 1945.

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